

## STATEMENT ON HB 4217

**Submitted on behalf of the Campaign to Protect Michigan Consumers  
And the Consumer Law Section Council of the State Bar of Michigan**

By Frederick L. Miller  
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The Campaign to Protect Michigan Consumers is a coalition of state organizations that includes the AARP, the Area Agencies on Aging, the Michigan Consumer Federation, the National Association of Consumer Advocates, the Michigan Catholic Conference, ACORN, the Michigan League for Human Services, the State Bar Consumer Law Section Council, the UAW and others.

I am an attorney, Litigation Coordinator for UAW Legal Services Plan, and a member of the council of the Consumer Law Section of the State Bar.

The Michigan Consumer Protection Act was designed to be the one broad consumer statute that sets standards for treating consumers for businesses generally in this state. Every state has a statute that fills this role, called by consumer advocates a UDAP (Unfair and Deceptive Acts and Practices) law. It is a set of standards for businesses to live up to, and a way to make sure that consumer-friendly businesses are not put at a competitive disadvantage as against those who draw extra customers by half-truths and earn extra money by hidden charges. It is also the chief tool available to consumers, their lawyers, and the Attorney General in their efforts to make the legal system responsive to abused consumers.

Right now, that tool is broken. The broad exemption of regulated business found by the Supreme Court in *Smith v Globe* threatens to swallow the Act whole.

Here's an example: A Saginaw couple, 80 year-old retirees, sought a contractor to fix their roof and back porch last year. The contractor they found never gave them a copy of documents he had them sign, never told them price (which was twice what a reasonable charge for the work to be done) and promised he would arrange affordable financing for them. A man showed up at their house and had them sign a stack of financing documents, without giving them time to read them. They only later understood they had mortgaged their house, at an interest rate much higher than what they had been told, with large fees and a kickback to the broker from the lender for selling a higher interest rate. The work done was shoddy and the house is now in foreclosure.

If the Consumer Protection Act applied, these businesses would be on notice that their conduct was unacceptable and illegal. Causing a probability of confusion about the terms of credit is a violation, as is charging an amount grossly in excess of the price at which similar services are sold and gross discrepancies between oral representations and a written agreement.

However, applying *Smith v Globe*, courts in Michigan have held that financial institutions are exempt. Whether contactors are exempt is before the Michigan Supreme Court now, and Justice Corrigan has already stated her view that they are, in a previous concurring opinion. *Smith* virtually dictates that all regulated businesses are exempt. And nearly every business is subject to some state or federal regulation.

Without the Consumer Protection Act, consumers are often treated under the law as if they were businesses in a dispute with another business, sophisticated contracting parties able to argue and haggle over each line of agreements and protect themselves throughout the process with lawyers. Under this kind of standard, the oral statements that misled our Saginaw retirees may be kept out of court, whatever the documents say may be considered to be the last word, and their house may be lost.

The Campaign to Protect Michigan Consumers applauds the efforts begun in this committee with this bill, to fix the Michigan Consumer Protection Act. However, we are concerned that the language in HB 4217 exempting any "method, act or practice that is expressly permitted by a statute, rule or regulation" is still too broad, capable of being misinterpreted to exempt categories of business practices, and perhaps even categories of businesses.

The Campaign, and the State Bar Consumer Law Section Council, prefer the entire elimination of subsection 4(1)(a) of the Act, which states the exemption language interpreted by the Court in *Smith v Globe*. Alternatively, Prof. Gary Victor of Eastern Michigan Business School has suggested adding the following explanatory language to the subsection's exemption:

"This subsection is intended to apply in the singular to a transaction or conduct; it is not intended to exempt any type of business on the basis that the general conduct of that business is regulated by law."

The legislature has over the years recognized the importance of setting enforceable standards through the MCPA, by adding many new sections to the Act as new consumer issues came to the fore. Now it is up to the legislature to make sure these standards actually apply to Michigan businesses, and in reality protect Michigan consumers, by getting rid of the blanket exemption created by *Smith v Globe*.

**FIXING THE MICHIGAN CONSUMER PROTECTION ACT:**  
*Good for consumers and honest businesses*

- Every state in the nation has one primary consumer protection statute—commonly called an unfair and deceptive practices, or UDAP, law.
- The purpose of a UDAP statute is to protect consumers by prohibiting businesses from engaging in unfair, unconscionable or deceptive practices.
- Michigan's UDAP law, the Michigan Consumer Protection Act (MCL 445.901 et. seq.) was one of the most far-reaching and powerful in the country when it was enacted in 1977.
- The MCPA allowed citizens to act as "private attorneys general"—giving them the legal tools to protect themselves and help eliminate unfair practices while saving Michigan enforcement dollars.
- The MCPA also protected fair and honest businesses by taking away the competitive advantage obtained through using unfair and deceptive business practices.
- The MCPA contains a narrow exemption section, 4(1)(a), which states that the Act "does not apply to. . . [a] transaction or conduct specifically authorized under law . . ."
- In *Smith v Globe Life Insurance*, 460 Mich 446 (1999), the Michigan Supreme Court interpreted this narrow exemption very broadly, so that now entire categories of businesses may be exempt from the application of the MCPA.
- The Supreme Court's interpretation has resulted in lower courts finding all types of businesses completely exempt from the MCPA as long as they are licensed to operate under a state or federal regulatory law.
- Most businesses are regulated to some extent, including many which result in the highest amounts of consumer complaints, including used car dealers, debt collectors and telemarketers.
- As a result of the Supreme Court's interpretation in *Smith*, the MCPA is now one of the weakest UDAP statutes in the country.
- Now, neither consumers nor the Attorney General can make use of the MCPA to respond to most of the major consumer protection problems we face.
- The Legislature can and must act to reinvigorate the MCPA by eliminating the broad exemption created by *Smith*, ideally done by deleting section 4(1)(a)—the section misinterpreted by the Court.

**Campaign to Protect Michigan Consumers**

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